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Appellant,

[redacted]

Appellee,

[redacted]

Appellant,

[redacted]

Appellee.

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QUESTIONS PRESENTED

1. Does equal representation of five districts on a municipal governing body exercising general governmental powers under an electoral scheme that combines at large and district representatives satisfy the principle of one person, one vote when the districts range in population from 350,000 to 2,200,000?

2. In evaluating the constitutionality of a municipal apportionment scheme for a governmental body exercising general governmental powers, may a district court consider evidence of alternative electoral designs that would substantially reduce voter inequality without sacrificing legitimate governmental interests?

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TABLE OF AUTHORITIES

Cases PAGE

Abate v. Mundt, 403 U.S. 182 (1971) ..... *passim*

Adams v. School Bd. of Wyo. Valley W., 332 F.Supp. 982 (M.D.Pa. 1971) 22

Andrews v. Koch, 528 F.Supp. 246 (E.D.N.Y. 1981), *summ. aff'd*, 688 F.2d 815 (2d Cir. 1982), *aff'd sub nom., Giacobbe v. Andrews*, 459 U.S. 801 (1982) 19, 41

Avery v. Midland County Commissioners' Court, 390 U.S. 474 (1968) ..... *passim*

Ball v. James, 451 U.S. 355 (1981) 38

Brown v. Thomson, 462 U.S. 835 (1983) ...21, 22, 23, 24, 42

Cohen v. Maloney, 410 F.Supp. 1147 (D.Del. 1976) 26, 36

Connor v. Finch, 431 U.S. 407 (1977) 21

Dallas County v. Reese, 421 U.S. 477 (1975) 27

Dunn v. Blumstein, 405 U.S. 330 (1972) 45

Dusch v. Davis, 387 U.S. 112 (1967) 27, 37

Fortson v. Dorsey, 379 U.S. 433 (1965) 27

Franklin v. Krause, 32 N.Y.2d 234 (1973), *appeal dismissed for want of a substantial fed. ques.*, 415 U.S. 904 (1974) 32, 36

Gaffney v. Cummings, 412 U.S. 735 (1973) 21

Gordon v. Lance, 403 U.S. 1 (1971) 32

Grisbaum v. McKeithen, 336 F.Supp. 267 (E.D.La. 1971) 26

Hadley v. Junior College District, 397 U.S. 50 (1970) .. 40

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Iannucci v. Bd. of Supervisors, 20 N.Y.2d 244 (1967) .. 8, 31, 35

Karcher v. Daggett, 462 U.S. 725 (1983) 38

Kilgarlin v. Hill, 386 U.S. 120 (1967) 21, 46

Kirkpatrick v. Preisler, 394 U.S. 526 (1969) 23

Kramer v. Union School District, 395 U.S. 621 (1969).. 45

Latino Political Action Committee, Inc. v. City of Boston, 568 F.Supp. 1012 (D.Mass. 1983) 26

League of Women Voters v. Nassau County Bd. of Supervisors, 737 F.2d 155 (2d Cir. 1984), *cert. denied*, 469 U.S. 1108 (1985) 35

Mahan v. Howell, 410 U.S. 315 (1973) .....*passim*

Markoe v. Legislature of the Virgin Islands, 592 F.2d 188 (3d Cir. 1979) 26

Martin v. Venables, 401 F.Supp. 611 (D.Conn. 1975) .. 26

McBride v. Mahoney, 573 F.Supp. 913 (D.Mont. 1983) 22

Oliver v. Board of Education, 306 F.Supp. 1286 (S.D.N.Y. 1969) 26

Perry v. City of Opelousas, 515 F.2d 639 (5th Cir. 1975) 26

Reed v. Reed, 404 U.S. 71 (1971) 45

Reynolds v. Sims, 377 U.S. 533 (1964) .....*passim*

Sailors v. Bd. of Education, 387 U.S. 105 (1967) 37

Sayler Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973) 38

Stanley v. Illinois, 405 U.S. 645 (1972) 45

Swann v. Adams, 385 U.S. 440 (1967) 40, 46, 47

Town of Lockport v. Citizens for Community Action, 430 U.S. 259 (1977) 8, 41

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Trimble v. Gordon, 430 U.S. 762 (1977) 45

Wells v. Rockefeller, 394 U.S. 542 (1969) 23

Wesberry v. Sanders, 376 U.S. 1 (1964) 45

Whitcomb v. Chavis, 403 U.S. 124 (1971) 17, 35

White v. Regester, 412 U.S. 755 (1973) 22

White v. Weiser, 412 U.S. 783 (1973) 38

WMCA v. Lomenzo, 238 F.Supp. 916 (S.D.N.Y. 1965) 33

Statutes

N.Y. Const.
art. VI 9
art. VIII 9
art. VIII, § 9 9
art. IX, § 1(a) 9
art. IX, § 1(h) 9
art. IX, § 3(d)(2) 9
art. XIII, § 13 9
art. XVIII 9

1894 N.Y. Const.
art. XII, § 2 3

1896 N.Y. Laws
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1897 N.Y. Laws
Ch. 378, § 1 3
Ch. 378, § 226 4
Ch. 378, §§ 282-391 4

1901 N.Y. Laws
Ch. 488, § 388 5
Ch. 488, § 1544 5

1922 N.Y. Laws
Ch. 58 9

1924 N.Y. Laws
Ch. 363 5

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1958 N.Y. Laws
Ch. 719 5

1984 N.Y. Laws
Ch. 64 3

N.Y. County Law (McKinney 1972)
§ 2(a) 9
§ 150 8

N.Y. Educ. Law (McKinney 1961)
§ 255 7
§ 2556(9) 7
§ 4604 7

N.Y. Exec. Law (McKinney 1982)
§ 256(7) 9
§ 331(3) 9
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N.Y. Gen. City Law (McKinney 1968)
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§ 24-c(e) 7
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§ 29 6
§ 37 6
§ 87 6

N.Y. Gen. Constr. Law (McKinney 1988 Supp.)
§ 66(2) 9

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N.Y. Gen. Mun. Law (McKinney 1986)
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§ 99-e(1) 9
§ 119-u(d)(2) 6
§ 241 6
§ 242 6
§ 243 7
§ 290 7
§ 692 7
§ 970-a–970-q 7

N.Y. Local Fin. Law (McKinney 1968)
§ 106.00(a) 9

N.Y. Mun. Home Rule Law (McKinney 1969)
§ 1(a) 9
§ 1(h)(1) 9
§ 2(b)(2)(b) 9
§ 2(8) 9
§ 3(d)(2) 9

N.Y. Mun. Home Rule Law (McKinney 1988 Supp.)
§ 10(1)(a)(13) 8

N.Y. Parks Rec. & Hist. Preserv. Law (McKinney 1984)
§ 35.05(3) 7

N.Y. Stat. Local Gov'ts (McKinney 1969)
§ 3(d)(2) 9

N.Y.C. Charter (Williams Press 1986)
§ 62(c) 3
§ 65 3
§ 67 7
§ 67(7) 7
§ 120(d) 6
§ 121(b) 3, 6, 7
§ 222(c) 6

PAGE

§ 223(c) 3, 6, 7
§ 372..... 3
§ 1150(2) 9
§ 1515-1516(a)..... 9
§ 2700..... 10
§ 2701(b) 10

Other Authorities

"Borough Government Report," New York State Legislative Institute (Sept. 1973) 4, 5, 6

"Borough Representation," Citizens Union Foundation Report to the New York City Charter Revision Commission (March 1988) 10

Charo, "Designing Mathematical Models To Describe One Person, One Vote Compliance By Unique Governmental Structures: The Case of the New York City Board of Estimate," 53 Fordham L.Rev. 735 (1985) . 4, 24, 35, 36

Community District Needs: Fiscal Year 1989, Staten Island, The City of New York (Oct. 1987) 11

Demographic Profile: A Portrait of New York City, Dep't of City Planning (Dec. 1983) 11

Dodge and McCauley, "Reapportionment: A Survey of the Practicality of Voting Equality," 43 U.Pitt.L.Rev. 527 (1982) 22

Fiscal Year 1989 Adopted Board of Estimate and City Council Changes (June 30, 1988) 11, 12

Grofman and Scarrow, "The Riddle of Apportionment: Equality of What?," 70 Nat'l Civic Rev. 242 (1981) .33, 35

Grofman and Scarrow, "Weighted Voting In New York," 6 Legis.Stud.Q. 287 (1981).....30, 36

Kramarsky, *The Structure, Powers and Functions of the Board of Estimate*, prepared for the State Charter Revision Commission for New York City (Aug. 1973).....4, 5, 6

Local Government Handbook (4th ed. 1987)..... 8

PAGE

MacManus, "Mixed Electoral Systems: The Newest Reform Structure," 74 Nat'l Civic Rev. 484 (1985) .. 30

New York Times

November 19, 1982 15
December 3, 1982..... 15
June 19, 1984 12
June 29, 1984 14
August 16, 1985 13
September 2, 1986 .....14, 15
August 20, 1987 .....13, 14
August 22, 1987 13
November 20, 1987 14
November 21, 1987 14
December 18, 1987..... 15
March 12, 1988..... 15
July 28, 1988..... 15

Office of the New York State Comptroller, "Reforming the Contract Process in New York City," Report No. 17-87 (Sept. 11, 1986) 7

Report of the Charter Revision Commission (1900) 5

Sanders, "The Government of American Cities: Continuity and Change in Structure," *The Municipal Yearbook 1982* (International City Management Association, 1982)..... 29

Sayre and Kaufman, *Governing New York City* (1960) . 3, 4, 6, 14, 15

Strengthening Local Government in New York: Summary, Temporary Commission on the Powers of Local Government (1973)..... 8

Weinstein, "The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government," 65 Col.L.Rev. 21 (1965) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1022, 87-1112

THE BOARD OF ESTIMATE, *et al.*,

Appellants,

—v.—

BEVERLY MORRIS, *et al.*,

Appellees.

FRANK V. PONTERIO,

Appellant,

—v.—

BEVERLY MORRIS, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF APPELLEES

STATEMENT OF THE CASE

The Board of Estimate (the "Board") governs New York City. The Board determines whether bridges stand or fall, whether a police or fire station will be built or closed, where to site a garbage dump or incineration plant, who will be a neighbor to a homeless shelter or jail, how much the City can afford for parks and parking, which private companies will provide

express bus or cable television service and what the conditions will be for building and business in the City. The Board is the ultimate arbiter of who prevails in the economic rivalry between neighborhoods, ethnic and racial communities and competing developers and business enterprises. For most, if not all, of those with an interest in New York City—whether financial, residential or social—the Board of Estimate is *the* critical governmental institution.

Membership on the Board consists of eight officials: the Mayor, the Comptroller, the President of the City Council, and the five borough presidents. The first three are selected through citywide elections. Appellees have not challenged their selection and service on the Board. Each of the other members of the Board, however, is selected in an election limited to the residents of a particular borough. Because the boroughs vary in population from 350,000 to 2,200,000, these five members represent widely disparate populations. These disparities are at the center of this law suit.

While the boroughs have radically disparate populations, each borough president has the same voting power on the Board: one vote. Each citywide member, on the other hand, is granted two votes. This system of weighted voting means that on most issues before the Board the citywide officials wield six votes and the borough presidents together, five. In one important area of the Board's responsibility, however, this is not the case. Because the Mayor does not vote with the Board in its consideration of the City's budget and budget-related issues, the five votes of the borough presidents can dominate the four votes of the citywide officials on budgetary issues.[1] Moreover, the citywide members regularly disagree on important issues.[2]

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1 The parties stipulated that when the Board acts on the budget, representatives of 41.7% of the City's population can control a majority vote of the Board. Joint Appendix 47, 206, 509 (hereafter "JA").

2 *See* Affidavit of former Borough President and Deputy Mayor Herman Badillo, JA 246 (hereafter "Badillo") ("[D]ivision of the citywide board members occurs frequently as a result of the political reality that the Comptroller and City Council President are often engaged in an ongoing campaign for the Mayor's office."). Counsel's review of the Board votes over the past two years reveals not a single instance in which the three citywide officials were aligned against the five borough presidents. *See infra* nn.30-37.

Consequently, even when all three citywide office holders are permitted to vote at Board of Estimate meetings, Board decisions regularly depend on the voting patterns of the borough presidents.[3]

The History Of The Board

The City's presentation of the history of the Board misrepresents two key points. First, the structure of the Board was not the product of a compromise among independent municipalities that was necessary in order to achieve New York City's consolidation. Second, borough government has never existed: City government has always operated through strong, centralized institutions; it is not a regional government.

1898-1961: In 1898, the State Legislature consolidated the City of New York out of three counties and several other formerly independent municipalities. Although straw-polls with mixed results preceded consolidation, 1984 N.Y. Laws Ch. 64, the consolidation was dictated by state authority.[4] 1896 N.Y. Laws Ch. 488; 1897 N.Y. Laws Ch. 378, § 1. The former municipalities did not survive in either function or geography.

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3 For certain procedural, budget, contract and franchise issues, various super-majority requirements enhance the outcome determinative power of the borough presidents. *See e.g.* N.Y.C. Charter §§ 62(c), 65, 121(b), 223(c), 372 (Williams Press 1986), reprinted in Appendix to the Jurisdictional Statement at 230-39 (hereafter "A").

4 The 1894 N.Y. Const. art. XII, § 2 gave each of the State's cities the right to disapprove special state legislation affecting it, subject to legislative override. Pursuant to this authority, Long Island City and Brooklyn approved the 1897 charter but New York's Mayor Strong refused to ratify. The State Legislature quickly overrode his veto. Staten Island was given no ratification authority. JA 453-57; W. Sayre and H. Kaufman, *Governing New York City*, 13-14 (1960) (reprinted in part at JA 269-94, hereafter "Sayre and Kaufman").

In their place emerged a single city with a new set of geographical subdivisions—the five boroughs—and a new set of City officers, including the borough presidents.[5]

One aspect of the centralization of authority was an expansion of the role of the Board of Estimate and Apportionment, which had been created in 1864 to administer the expenses of an intercommunity police force.[6] The 1898 Charter gave the Board the power to estimate the expenses of City government, establish the tax rate and transfer funds between City departments. Kramarsky, JA 60. Membership on the Board did not include the five borough presidents. 1897 N.Y. Laws Ch. 378, § 226. In no sense, then, does the history of consolidation support the proposition that the Board's current structure is the product of a compromise or concession under which formerly independent communities agreed to centralization in return for equal representation in the organs of City government. *See* Brief of Municipal Appellants and Appellant Straniere at 8-9 (hereafter City's Brief).

In the years immediately following consolidation, Republicans and insurgent Democrats in Brooklyn chafed under a City government controlled by the Manhattan (Tammany) wing of the Democratic Party. In 1901, amendments to the City Charter simultaneously secured the place of the Board as "the center of gravity in the City's political process,"[7] and strengthened the borough presidents who, as administrative officers of the City government were given control over the delivery of certain City services. Kramarsky, JA 62-64; Borough Government Report,

5 The borough presidents had virtually no power and no role in the first City government. 1897 N.Y. Laws Ch. 378, §§ 282-391; *see also* "Borough Government Report," New York State Legislative Institute (Sept. 1973), JA 295, 301 (hereafter "Borough Government Report"); Sayre and Kaufman at 14.

6 Kramarsky, *The Structure, Powers and Functions of the Board of Estimate*, prepared for the State Charter Revision Commission for New York City (August 1973), JA 59 (hereafter "Kramarsky").

7 Sayre and Kaufman, JA 270. *See* Charo, "Designing Mathematical Models To Describe One Person, One Vote Compliance By Unique Governmental Structures: The Case of the New York City Board of Estimate," 53 Fordham L.Rev. 735, 744 (1985) (hereafter "Charo").

JA 302-05; 1901 N.Y. Laws Ch. 488 §§1544, 388. Board membership was altered to include the five borough presidents for the first time. A system of weighted voting was established roughly reflecting population disparities.[8] The citywide officials with three votes each were given a majority to guarantee a citywide perspective.[9] The borough presidents of Brooklyn and Manhattan (the most populous boroughs) were given two votes; and the remaining borough presidents, one vote. This system of weighted voting remained in place until 1958.[10]

From 1924 to 1938 the Board was officially the upper house of the City legislature. 1924 N.Y. Laws Ch. 363. In 1938, a new charter reduced the powers of the borough presidents individually and of the Board collectively. Kramarsky, JA 67-69. The Board lost the power to initiate, although not the power to approve, municipal legislation. Borough Government Report, JA 306; Kramarsky, JA 67. Still, the Board retained its position as the key actor in City government, maintaining, in addition to its direct legislative authority, its control of City resources and of development in the City. It also remained the final voice on all major municipal controversies and financial issues.

1962-1988: Nineteen sixty-two was a watershed year in the century-long trend toward centralization of City government. A new charter took effect that stripped the borough presidents of virtually all their remaining administrative functions. The only significant formal power retained by borough presidents derived from their seats on the Board; the other powers of office were either advisory or aspects of the "community advo-

8 *Report of the Charter Revision Commission* at 19 (1900) ("[I]t was not thought just to give to the representatives of the smaller boroughs an equal vote . . . .") (hereafter "Charter Revision Report") (lodged with the Clerk's Office).

9 Charter Revision Report at 19 ("It . . . seemed essential that the total voting power of the five Borough Presidents should be less than that of the officers elected from the City at large.").

10 1958 N.Y. Laws Ch. 719. *See also* Kramarsky, JA 70. In 1958, votes on the Board were redistributed: Each borough president was given two votes and each citywide official, four.

cate'' role. Borough Government Report, JA 311-330; Kramarsky, JA 72-73.

While individually the borough presidents lost power, the Board itself remained at the center of City government.[11] It retained its legislative role in budgetary decisions, as well as its control over zoning and over the disposition of all City property, franchises and contracts. Kramarsky, JA 72. In addition, it approved the standards, scope, and final design of all capital projects. *Id.* Moreover, as federal appropriations for housing and community development grew, the Board's role as shaper of the City's development grew. Badillo, JA 243-45.

Charter revisions approved in 1975 further expanded the Board's power in relation to the City's budget. N.Y.C. Charter §§ 121(b), 223(c). Simultaneously, these revisions enhanced the power of the borough presidents on the Board by excluding the Mayor from voting when the Board acts on the budget. N.Y.C. Charter §§ 120(d), 222(c).

In sum, the Board has always been and continues to be the City's predominant institution of centralized government.[12]

The Responsibilities Of The Board

The Board's functions are a mix of legislative and executive tasks. Its power over the budget of New York City, for example, is typically "legislative."[13] The Board, acting without the

11 In 1973, the Kramarsky Study concluded: "[T]he Board of Estimate has retained its position of primacy in the city government." JA 74.

12 Sayre and Kaufman, JA 294 ("On the chessboard of the city's politics, the Mayor may be king, but the Board of Estimate is queen.").

13 An array of powers granted to the Board by the State Legislature—including its power over land use, franchising, and zoning—are elsewhere in the State granted to municipal legislative bodies. N.Y. Gen. City Law §§ 26, 29, 37, 23(2)(b), 23, 20(24), 20(25), 87 (McKinney 1968). *See also* N.Y. Gen. Mun. Law §§ 72-h (transfer public lands), 119-u(d)(2) (intermunicipal cooperation), 241 (dedicate land for playgrounds), 242 (determine control of

Mayor, has the same budgetary functions as the City Council. N.Y.C. Charter §§ 121(b), 223(c). Together, they act as a bicameral legislature in determining the City's expense and capital budgets. The Board holds regular hearings on the budget, during which commissioners of various Mayoral agencies must justify their proposed budgets and report on their recent activities and administration, just as executive agencies everywhere report to legislative bodies.

The Board's non-budgetary authority is equally far-reaching. It must approve the franchise or lease of any City property; it has final decisionmaking authority over all development within the City through its unbridled zoning authority; and it controls the standards, scope and design for all capital projects. N.Y.C. Charter § 67. The Board also controls five billion dollars of City contracts per year.[14] Its fiscal responsibilities include setting sewer and water rates, granting tax abatements, which are critical to the development of business enterprises in economically depressed areas, and allocating property taxes in urban development projects. N.Y. Gen. Mun. Law §§ 692, 970-a–970-q (McKinney 1986); N.Y.C. Charter § 67(7).

While extensive, this list of formal powers hardly describes the Board's actual power within City government. For example, although the Board does not formally establish the City's tax rates, it has a significant impact on those rates through its cumulative powers to control revenue from land use and franchises, to authorize City spending and to grant tax abatements. Even enforcement of City Council ordinances is dependent upon the Board's allocation of sufficient resources to fulfill the

playgrounds), 243 (establish recreation commission), 290 (establish facilities for elderly), 692 (establish urban development action areas), 970-c (approve tax increment financing) (McKinney 1986); N.Y. Gen. City Law §§ 20(29) (enter contracts for health insurance), 24-c(e) (establish business improvement districts) (McKinney 1968); N.Y. Educ. Law §§ 255 (establish public libraries), 2556(9) (authorize use of surplus education money), 4604 (create literacy programs) (McKinney 1961); N.Y. Parks Rec. & Hist. Preserv. Law § 35.05(3) (approve development of urban cultural parks) (McKinney 1984).

14 Office of the New York State Comptroller, "Reforming the Contract Process in New York City," Report No. 17-87 (Sept. 11, 1986) at 3.

Council's legislative promises. As history has demonstrated and as the Nation's constitutional framers understood, the power to control the purse translates into the power to control the aims and effectiveness of government. In New York City, the Board has the power of the purse.

The Board Of Estimate Is An Instrument Of Centralized City Government, Not A Regional Arrangement

Elsewhere in New York State, regional government exists in the form of county governments, which address concerns that cross municipal boundaries.[15] *See Town of Lockport v. Citizens for Community Action*, 430 U.S. 259, 260-72 (1977). No analogous regional structure exists in New York City, which has only a single level of local government.[16] The governmental powers

15 Before *Reynolds v. Sims*, 377 U.S. 553 (1964), each county was governed by a board of supervisors consisting of the elected supervisors of the county's towns. Each town supervisor exercised an equal vote on the county board, regardless of the population he or she represented. N.Y. County Law § 150, *et. seq.* After *Reynolds*, this voting scheme was held unconstitutional. *See* Weinstein, "The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government," 65 Col.L.Rev. 21, 40-49 (1965); *Iannucci v. Bd. of Supervisors*, 20 N.Y.2d 244, 249 (1967). Each of the 57 counties outside of the City reconstituted its board through the use of single or multimember districts, *see Abate v. Mundt*, 403 U.S. 192 (1971), or weighted voting schemes. *Iannucci, supra. See* N.Y. Mun. Home Rule Law, § 10(1)(a)(13) (McKinney 1988 Supp.).

16 In 1973, the Wagner Commission noted:

> Governmentally, New York City is unique in the State . . . . [T]here are no subordinate nor superior levels of government in New York City which consists of five counties but has no county government. The five boroughs are geographical rather than administrative units.

Strengthening Local Government in New York: Summary, Temporary Commission on the Powers of Local Government at 13 (lodged with the Clerk's Office). *See also* N.Y.S. Dep't of State, *Local Government Handbook* (4th ed. 1987) at 59 ("The five boroughs of the City of New York are vestigial counties for certain purposes, although they are not organized as such nor do they operate as county governments.").

distributed between counties and municipalities in the rest of the State all fall within the City's centralized municipal government.[17]

Thus, borough presidents do not sit on the Board as representatives of independent local governments. The boroughs simply do not exist as governmental units. In fact, the City Charter denominates the boroughs as City agencies. N.Y.C. Charter § 1150(2).[18] The borough president is the sole borough official and he or she has only one source of power: the vote on the Board. Without subordinate governmental units, City government may be large but it is not "regional."

Furthermore, the relevance of borough boundaries in general has substantially diminished.[19] Their importance as geographical divisions has been undermined by the ease of interborough movement provided by modern mass transit, as well as by the distinctiveness of local communities within each of the four large boroughs. Few New Yorkers use borough boundaries to identify their home and work communities. Rather, they con-

17 The State has vested all local powers in the City, whereas elsewhere these powers are divided between county, city, town and village governments. N.Y. Mun. Home Rule Law §§ 1(a), 1(h)(1), 2(b)(2)(b), 3(d)(2) (McKinney 1969); JA 430-49; *see also* N.Y. County Law § 2(a) (McKinney 1972); N.Y. Gen. Mun. Law § 99-e(1) (McKinney 1986); N.Y. Local Fin. Law § 106.00(a) (McKinney 1968); *see* N.Y. Const. art. IX, § 1(h) & art. XIII, § 13; N.Y. Exec. Law §§ 256(7), 331(3), 357 (McKinney 1982); *compare* N.Y. Const. art. VIII, § 9 with art. IX, § 1(a).

18 The N.Y. State Constitution never mentions "boroughs," though it makes countless references to the State's local governmental units: counties, cities, towns and villages. *See e.g.* N.Y. Const. art. IX, § 3(d)(2); art. VIII, art. VI, art. XVIII; *see also* N.Y. Gen. Constr. Law § 66(2) (McKinney 1988 Supp.); N.Y. Stat. Local Gov'ts § 3(d)(2) (McKinney 1969); N.Y. Mun. Home Rule Law § 2(8) (McKinney 1969) (definition of "local government" and "municipal corporation" does not include "borough").

19 There have been no borough taxes since 1922. 1922 N.Y. Laws Ch. 58. And since 1961 all taxes have been citywide. *See* N.Y.C. Charter §§ 1515-1516(a).

sider themselves either residents of the City in general, or of local, sub-borough communities—or perhaps both.[20]

Increasingly, the centralized government of the City operates directly on and through these sub-borough communities. Starting in 1977, the City established an active community district system designed to represent neighborhoods and stimulate local community life. City services and planning are organized around 59 community districts, rather than five boroughs. Community planning boards in each of these districts have been established as an alternative to, not an example of, borough government.[21]

Although the borough presidents are the representatives of community needs, they have no final decisionmaking authority over the proposals of these various community boards. Only as members of the Board of Estimate can the borough presidents rule on those decisions. Thus, to the extent that the borough president participates in decisions about local communities, he or she does so as a member of the Board—as a member of an institution of centralized City government—not as chief executive of something that the City attempts to identify as "borough government."

Equal Representation Of Boroughs On The Board Has Substantially Advantaged The Smaller Boroughs

New York City has more people than 41 states. Its budget is exceeded only by that of California and New York State. Considered by itself, Brooklyn would be the nation's fourth largest city; it is larger than 17 states.

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20 The diversity of community interests within the boroughs is reflected, for example, in the fact that City Council members from different districts within the same borough regularly disagree. *See* "Borough Representation," Citizens Union Foundation Report to the New York City Charter Revision Commission at 58-60 (March 1988) (lodged with the Clerk's Office); *see also id.* at 34-37 ("Survey: How New Yorkers See Themselves").

21 N.Y.C. Charter § 2700 commits the City to the use of community districts for the delivery of services and City planning. It specifically recognizes that reliance on other geographic districts "impeded" delivery of services and citizen involvement. *See* N.Y.C. Charter § 2701(b) for the criteria for the designation of community districts.

Brooklyn, like the other large boroughs, is comprised of many distinct communities.[22] Many of these communities are as populous as Staten Island, and like Staten Island, have identifiable common interests. Unlike Staten Island, however, within the large boroughs, local community interests are likely to clash with one another. Brooklyn, for example, has 18 community districts and Staten Island only three. The borough president of Brooklyn will far more often have to choose among the community interests he or she will represent on the Board than the borough president of Staten Island.

The sharpest and clearest measure of the disparity of representation of "local" interests on the Board is the electoral power granted Staten Island. With only 350,000 residents, Staten Island remains small and relatively homogeneous.[23] No other similarly situated community, measured in terms of population and demographics, is similarly represented on the Board. No other "local" community is represented on the Board at all. Instead, other local communities in a city of neighborhoods must compete with each other to influence their single representative.[24]

The preferred political status of Staten Island has translated into the power to claim and receive a disproportionate share of the City's resources. For instance, the City's Expense Budget for 1988-89 provides Staten Island's borough president a larger administrative office budget ($5.1 million) than the borough president of Manhattan ($4.8 million).[25] Staten Island's $5.1

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22 *Demographic Profile: A Portrait of New York City*, Dep't of City Planning (Dec. 1983).

23 Affidavits of Marchi, JA 444-46; Tobier, JA 264-68; Trautman, JA 479-89; Jaffe, JA 490-97; *see Community District Needs: Fiscal Year 1989, Staten Island*. The City of New York (Oct. 1987) (lodged with the Clerk's Office).

24 As former Borough President and Deputy Mayor Herman Badillo, City Council representative Wendell Foster and former Chairman of the City Council Budget Committee Edward Sadowsky describe, a borough president simply cannot represent the multiplicity of conflicting communities which comprise each of the large boroughs. JA 240-56.

25 *Fiscal Year 1989 Adopted Board of Estimate and City Council Changes* at 8-12 (June 30, 1988) (lodged with the Clerk's Office).

million is close to the amount received by Brooklyn and Queens ($5.8 million). Furthermore, the second smallest borough, the Bronx, is to receive the largest amount ($6.6 million). This is the budget that finances all constituent services. In dollars per constituent, Staten Island receives $14.43, Brooklyn, $2.61, Queens, $3.08, Manhattan, $3.39 and the Bronx, $5.66. These figures directly correspond to the inverse of population size, with the largest boroughs receiving the least.

The same inverse relationship appears in the funding of public service programs. In fiscal 1989, Staten Island will receive $1,886,690; Brooklyn, $3,969,200; Queens, $3,979,000; Manhattan, $3,430,896; and the Bronx, $3,144,060.[26] This means that Staten Island will receive $5.36 per person, Brooklyn, $1.78, Queens, $2.10, Manhattan, $2.40 and the Bronx, $2.69.[27]

Similar disproportions appear in capital spending. The following table compares Staten Island to three demographically similar community districts of slightly greater combined population in Queens, and three much poorer community districts of slightly less population in Brooklyn.[28] Staten Island's preferred position is again evident:

26 *Id.* at Appendix, "1989 Budget Adoption; Staten Island, Brooklyn, Queens, Manhattan, Bronx."

27 Such disproportionate distributions of public service program funding are not new. Typically, each borough received an *equal* amount. "Seven Million Given Borough Chiefs Upsets City Hall," *New York Times*, June 19, 1984, at B1 ("[The Mayor] said there was no way to block the demand because he could not vote on budget matters.").

28 Detailed demographic comparisons of Staten Island with Queens Community Districts 8, 11 and 13 and Brooklyn Community Districts 3, 4 and 16 appear at JA 268.

Capital Budget Comparisons[29]

Neighborhood	Population	Total Estimated Cost of Line Item Projects	Total Line Item Appropriations Through Fiscal Year 1983	Fiscal Year 1984 Adopted Capital Budget
Staten Island CDs 1, 2, 3	351,863	$586,573,000	$289,581,000	$74,163,000
Brooklyn CDs 3, 4, 16	300,444	225,429,000	68,354,000	16,723,000
Queens CDs 8, 11, 13	409,534	361,606,000	114,846,000	47,989,000

The disproportionate power of Staten Island on the Board is not limited to its access to a disproportionate share of City resources. Staten Island's borough president participates as an equal to the other district representatives in all of the decisions that come before the Board. For example, in 1984, the Board decided by a six to five vote to place an incineration plant at the Brooklyn Navy Yard. The majority coalition consisted of the Mayor and the four borough presidents other than that of Brooklyn.[30] Similarly, last year the Board by a six to five vote approved a plan that would place only one homeless shelter in Manhattan and no shelters in Staten Island, while locating 10 shelters in the other boroughs. The Mayor, City Council President and Borough Presidents from Manhattan and Staten Island formed the winning coalition.[31] Later last year, the same coalition swept aside community opposition to subsidized

29 This material was presented in courts below and not contradicted by the City. *See* Appellees' Brief in the Second Circuit (March 23, 1987) at 30 (data from *Fiscal Year 1985: Statements of Community District Needs*, New York City Office of Management and Budget).

30 "Approval is Given for Incinerator at Brooklyn Site," *New York Times*, August 16, 1985, at A1; *see also* Joint Appendix in the Second Circuit at 868.

31 "Board Approves Plan for Shelter," *New York Times*, August 20, 1987, at A1; "Homeless, Politicians and a Deal," *New York Times*, August 22, 1987, at A29.

middle-income condominiums in the Bronx.[32] If these votes on the Board had been weighted proportionately to population, the losers in these controversies would have prevailed.[33]

The City responds to the disproportionate power wielded by the residents of Staten Island by pointing to the history of unanimity within the Board.[34] This public unanimity however, does not reflect the real divisions on the Board. The Board operates under a custom of public unanimity, which conceals the real decisionmaking that occurs largely in private. Sayre and Kaufman refer to the Board's consistent policy of "avoid[ing] any public revelation of division within its membership."[35] JA 282. Similarly, former Borough President Herman Badillo describes "unanimous votes [as] by no means reflective of the divisions on the Board." JA 245. Within these secret negotiating sessions, no other group of 350,000 residents has the same power as Staten Island.

On many important City issues, moreover, public unanimity breaks down. The Brooklyn Navy Yard incineration plant,

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32 "New York Approves Plan to Build 750 Apartments for Middle Class," *New York Times*, November 21, 1987, at A1.

33 Appellees do not suggest that a weighted voting scheme is the only alternative to the present Board system. It is, however, an alternative considered by the lower courts and widely used in New York State. JA 561-69.

34 The City asserts that 97% of Board votes are unanimous. City's Brief at 13-14. This figure conceals the large proportion of procedural and routine votes. Because Board calendars average at least 300 to 400 items every two weeks, most items are disposed of on a *pro forma* vote, conducted in the absence of actual Board members. JA 93; "Bit Players Stand in for Elected Stars on the Board of Estimate's Stage," *New York Times*, June 29, 1984, at B1 (reprinted in Joint Appendix in the Second Circuit at 905-06).

35 Sayre and Kaufman, JA 284-85 ("When agreement proves difficult, the Board will usually clear the room of all nonmembers and then proceed to a bargained adjustment of their differences or to an agreement to deal . . . . [A]ll members . . . subscribe increasingly to the caucus objective of private bargaining followed by public unanimity."). This system of backroom negotiations continues to this day. *See* "Dinkins Plays a Strong Role in Borough Job," *New York Times*, September 2, 1986, at B1; "Homeless, Politicians and a Deal," *New York Times*, August 20, 1987, at A1; "Three Officials Sue Koch on Shelters," *New York Times*, November 20, 1987, at B1; "New York Approves Plan to Build 750 Apartments for Middle Class," *New York Times*, November 21, 1987, at A1.

homeless shelters and subsidized condominiums, are some examples. *See supra* at 13-14. A Chinatown jail (approved seven to four), a renewal project for the South Bronx (rejected seven to four), a plan to convert abandoned Manhattan housing into cooperative apartments (approved six to five), a Manhattan development (approved six to five), and a plan for homeless shelters in Bedford-Stuyvesant and Harlem (rejected seven to four and nine to two, respectively) are others.[36] When public divisions occur—and they occurred in 382 instances in 1987—they invariably include divisions among the citywide officials.[37]

The Proceedings Below

Appellees brought this action in December, 1981. One year later, the District Court dismissed the complaint on the grounds that "the Board . . . is not an elected body." A 222. The Second Circuit Court of Appeals reversed, holding "that the Board of Estimate is selected by popular election and performs general governmental functions." A 200. Notably, in the course of this first appeal, the City conceded that

> [i]f the one person, one vote requirement is applied to the Board of Estimate, defendants would agree that the allocation of votes among the borough presidents should be based upon the population of the borough.

City Appellees' Brief in the Second Circuit (March 21, 1983) at 2.

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36 "Jail Near Chinatown Is Approved by 7 to 4 By Board of Estimate," *New York Times*, December 3, 1982, at A1; "$250 Co-op Plan, With Condition, Voted," *New York Times*, November 19, 1982, at B2 (reprinted in Joint Appendix in the Second Circuit at 257, 260); "Dinkins Plays a Strong Role in Borough Job," *New York Times*, September 2, 1986, at B1; "Koch Proposals to Convert Two Buildings to Shelters Are Rejected," *New York Times*, March 12, 1988, at A36; "Estimate Board Defeats Koch Plan on East Harlem Homeless Shelter," *New York Times*, December 18, 1987, at B1; Badillo, JA 243-45.

37 *Supra* n.2; Sayre and Kaufman, JA 277-80, 287, 289-91, 293-94. Of the 382 divided votes in 1987, the Mayor and the Comptroller divided in 310 instances. *See also* "Koch and Goldin: The Feud Gets Down to Basics," *New York Times*, July 28, 1988, at B1.

On remand, Plaintiffs moved for summary judgment and all parties stipulated that the case should proceed upon undisputed facts as developed through affidavits and exhibits.[38] The District Court issued two opinions in a bifurcated proceeding. In the first, it concluded that there was a total deviation of 132.9% from voter equality among the boroughs.[39] A 163. In the second, it concluded that while the City's interests in maintaining "natural boundaries" and the "integrity of political subdivisions," promoting "effectiveness," providing "meaningful representation to smaller boroughs in board affairs" and "checking the mayor and supplementing the City Council" were legitimate municipal concerns, they were not served by the Board voting scheme. A 85-97. Furthermore, it held that "alternatives have been suggested that would 'substantially vindicate' the acceptable policies and interests 'yet approximate population equality more closely.' " A 109 (citation omitted).

The Second Circuit Court of Appeals affirmed both aspects of the District Court's decision.[40] A 5-47.

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38 Appellant Ponterio now asserts that summary judgment was improperly granted. Brief of Appellant Ponterio at 31 (hereafter "Ponterio Brief"). Ponterio himself specifically agreed to proceed without a hearing in the District Court. JA 399-403.

39 This figure was based upon application of the methodology employed in *Abate v. Mundt*, 403 U.S. 182 (1971). Comparing the actual population of each borough with the average borough population of 1,414,206, produces a total deviation of 132.9%:

Borough	*Population*	*Deviation from the Average*
Brooklyn	2,230,936	- 57.7%
Queens	1,891,325	- 33.7%
Manhattan	1,427,533	- 0.9%
Bronx	1,169,115	+ 17.4%
Staten Island	352,121	+ 75.2%

40 In response to the decisions below, the Mayor appointed a Charter Revision Commission. The Chairman of the Commission, numerous civic groups and several members of the Board of Estimate have presented plans

SUMMARY OF ARGUMENT

The Board of Estimate is the most important government institution in New York City, exercising a variety of legislative—including budgetary—and executive powers. Despite the fact that the Board exercises "general governmental powers" over the entire City, and serves as the second house of a bicameral legislature on many issues, it has never been reapportioned on the basis of population. Since 1901, it has based elective representation on political and geographic subdivisions: the boroughs. These subdivisions range in size from Staten Island with 350,000 residents to Brooklyn with 2,200,000. Staten Island, with one-sixth the population of Brooklyn, exercises the same power and influence on the Board as each of the other boroughs.

The lower courts found a 132.9% disparity from population equality among the boroughs. The City challenges this finding by offering a purely theoretical and highly controversial mathematical model for calculating voting power. The City urges this Court to turn from a concept of voter equality that emphasizes participation in the electoral process to one that emphasizes voter control over decisionmaking within a government institution. No court has ever accepted the City's methodology and, more importantly, this Court has already rejected it. *Whitcomb v. Chavis*, 403 U.S. 124, 145-46 (1971). The City's model is unfounded in fact, flawed in theory and entirely too complex. The difficult mathematics it requires could neither be understood by the citizens whose rights are at issue nor accurately applied by lawyers and courts. Finally, in this case the City's model produces too little: Its application here yields a deviation far larger than any this Court has ever approved.

To determine voter power the City's methodology relies on a theoretical aggregation of representatives elected at large with

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to the Commission for addressing the one person, one vote requirement. The plans under consideration include proposals for reapportioning the Board, eliminating it, utilizing weighted voting and removing most of its general governmental powers.

representatives elected from single-member districts. This approach is an attempt to mitigate the substantial population differences among the single-member districts. But the lower courts found, and the City has conceded, that the at large and district representatives serve different functions and respond to different political forces. Neither evidence in this case, nor reasons of political theory, suggest that the at large members actually align themselves with the interest of the larger boroughs. To the contrary, the City's budget allocations demonstrate that the smaller boroughs have been able to achieve a disproportionate influence and receive a disproportionate share of the City's resources.

In an attempt to justify the tremendous population disparities among Board districts, the City relies principally upon an argument that New York City is a "regional government." New York City, however, has a typical, centralized—not a regional—governmental structure. Borough government does not exist. The borough presidents have power only as members of the Board. While they represent local interests on the Board, "local" cannot mean 350,000 people in one district and 2,200,000 in another.

The lower courts did not apply a "least restrictive alternative" test. Rather, the District Court noted that there were reasonably available alternatives that would substantially reduce the population disparities and simultaneously satisfy all of the City's legitimate interests. As this Court has made clear, unless a district court is free to examine alternative electoral systems, it cannot evaluate the strength of governmental interests in a challenged apportionment scheme. The lower courts did not require or even suggest that the City had to pursue any one of these alternatives; rather, they recognized that redesigning the Board is a legislative task.

ARGUMENT

New York City does not dispute that Board members are popularly elected and that the Board exercises "general governmental powers over the entire geographic area served." *Avery v. Midland County Commissioners' Court*, 390 U.S. 474, 485 (1968). Despite the clarity of this Court's rulings on the application of the principle of "one person, one vote" to elective institutions of municipal government, the City has yet to make even a first step toward reapportioning the Board on the basis of population. Rather than defend a good faith effort to achieve voter equality, the City argues for the right of its smallest borough to be elevated to a privileged status.

The Board continues to govern New York City just as if this Court had never decided *Reynolds v. Sims*, 377 U.S. 533 (1964), and a host of other reapportionment cases over the past 25 years. Just as this Court held that the New York City Council had to respect the constitutional mandate of one person, one vote, *Andrews v. Koch*, 528 F.Supp. 246 (E.D.N.Y. 1981), *summ. aff'd*, 688 F.2d 815 (2d Cir. 1982), *aff'd sub nom.*, *Giacobbe v. Andrews*, 459 U.S. 801 (1982), it should hold that the Board, which itself exercises legislative powers and acts in important respects as the coordinate house of a bicameral legislature with the City Council, must respect this constitutional rule.

I.

Municipal Government Must Meet Well-Settled Criteria Of Voter Equality

As state-created entities, municipalities draw their authority and their constitutional responsibilities from state legislative power:

> We . . . see little difference, in terms of the applications of the Equal Protection Clause and of the principles of *Reynolds v. Sims*, between the exercise of state power through legislatures and its exercise by elected officials in the cities, towns and counties.

Avery v. Midland County, 390 U.S. at 481. Thus, the starting point for a system of apportionment is the same for both state and municipal government:

> [T]he constitution imposes one ground rule for the development of arrangements of local government: a requirement that units with general governmental powers over an entire geographic area not be apportioned among single member districts of substantially unequal population.

Id. at 485-86.

This "ground rule" has evolved into two subrules. First, there is an absolute limit to population inequalities among electoral districts, regardless of the strength of countervailing justifications. Second, the peculiar problems of local government—including the judicially noted need for "flexibility"—will be considered in a case-by-case evaluation of the justifications offered in defense of population inequality. The Board satisfies neither of these subrules.

A. The Deviations From Voter Equality Among The Board Districts Are Per Se Unconstitutional

That there must be a limit beyond which quantitative deviations from the right to an equal vote cannot be overcome by other state ends is implicit in the fundamental premise of the Court's modern apportionment jurisprudence:

> [T]he overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.

Reynolds, 377 U.S. at 579. This simply could not remain the "overriding objective" if population equality could always be displaced by other state ends. Accordingly, the Court has tempered its openness to countervailing justifications with a warning that the place of those justifications is necessarily limited:

> [A] State's policy urged in justification of disparity in district population, however rational, cannot constitutionally

> be permitted to emasculate the goal of substantial equality.

Mahan v. Howell, 410 U.S. 315, 326 (1973); *see also Connor v. Finch*, 431 U.S. 407, 419 (1977); *Brown v. Thomson*, 462 U.S. 835, 849-50 (1983) (O'Connor, J., concurring).

While the Court has never said "exactly so far, and no further," *see Mahan*, 410 U.S. at 329, there is no longer much doubt about the range of permissible variations. This Court has never upheld a state or local electoral scheme, regardless of the justifications offered, with a deviation from voter equality of more than 17%. On several occasions, the Court has expressed extreme doubt that deviations much above that level could survive in any situation. For example, in *Kilgarlin v. Hill*, 386 U.S. 120, 123 (1967), the Court rejected an apportionment plan for the Texas House of Representatives that contained a 26% deviation:

> We are doubtful . . . that the deviations evident here are the kind of "minor" variations which *Reynolds v. Sims* indicated might be justified by local policies counseling the maintenance of established political subdivisions in apportionment plans.

Lower percentage deviations have been accepted, but with stern warnings that they were approaching the constitutional limits. Thus, in *Mahan*, the Court accepted the justifications offered for a 16.4% deviation, but warned that "this percentage may well approach tolerable limits." 410 U.S. at 329. Similarly, the Court warned that its acceptance of the justifications offered for an 11.9% deviation in a county government scheme should not be interpreted as an invitation to test yet higher deviations. *Abate v. Mundt*, 403 U.S. 182, 187 (1971) ("[N]othing we say today should be taken to imply that even these factors could justify substantially greater deviations from population equality.").

The Court's treatment of quantitative variations in state and local apportionment plans has resulted in three clear ranges or categories of percentage deviation. *See generally Gaffney v. Cummings*, 412 U.S. 735, 744-45 (1973). Below 10%, popula-

tion deviations from numerical equality in state and local apportionment schemes are considered *de minimis*. *White v. Regester*, 412 U.S. 755, 764 (1973). Deviations from 10% to about 17% may, under some circumstances, be justified. Above that, deviations are impermissible. They must be, if the rule of one person, one vote is to remain a constitutional requirement and not just one among a variety of policies that a state or local government may choose to implement through its apportionment plan.

These ranges have been well understood by the lower courts. In the period from 1969 to 1982, every local apportionnent scheme with variances higher than 10% was struck down with two exceptions.[41] Of the two exceptions, one was at 10% and the other at 40%. The latter involved the electoral districts for the board of a small Pennsylvania school district. *Adams v. School Bd. of Wyo. Valley W.*, 332 F.Supp. 982 (M.D.Pa. 1971). The result was clearly aberrational and has not been followed by any other court. Since 1982, only *Brown v. Thomson*, 462 U.S. 835 (1983), could have suggested a relaxation of the rule on permissible deviation. But no lower court has relied on *Brown* to uphold an apportionment scheme with a deviation greater than 11%. *See McBride v. Mahoney*, 573 F.Supp. 913 (D.Mont. 1983) (upholding 10% deviation in state legislative redistricting plan).

In response to these clear numerical guidelines, the City asserts two propositions: first, that a different and less strict rule applies to local, as opposed to state, apportionment plans; second, that *Brown* upheld a state apportionment scheme with a substantial population deviation. Both propositions are wrong.

To be sure, the Court has suggested that somewhat larger population deviations are allowed at the local and state levels than would be permissible for congressional districts. But nowhere has the Court ever suggested that substantial population inequalities would be permissible. In the very case that the City cites in support of this proposition, *Abate v. Mundt*, 403 U.S. 182 (1971), the Court emphasized that the greater need for

41 *See* Dodge and McCauley, "Reapportionment: A Survey of the Practicality of Voting Equality," 43 U.Pitt.L.Rev. 527, 566 (1982).

flexibility in local government structure could only "lend support to the argument that *slightly* greater percentage deviations may be tolerable for local government apportionment schemes." *Id.* at 185 (emphasis added). *Abate* itself involved a population deviation of 11.9%, or less than one-tenth the size of that on the Board, and still the Court suggested that it was near the limit.[42]

Similarly, the City vastly exaggerates the significance of *Brown*. In *Brown*, plaintiffs had narrowly cast their case in order to challenge just one aspect of the state apportionment scheme: the assignment of a separate representative to the least populated county. They specifically were not making a challenge to the scheme's state-wide population deviations:

> Here we are not required to decide whether Wyoming's nondiscriminatory adherence to county boundaries justifies the population deviations that exist throughout Wyoming's representative districts.

462 U.S. at 846. Indeed, Justice O'Connor's critical concurrence made entirely clear that the Court did not approve the state apportionment scheme:

> I have the gravest doubts that a statewide legislative plan with an 89% maximum deviation could survive constitutional scrutiny despite the presence of the State's strong interest in preserving county boundaries.

Id. at 850. If the constitutionality of the plan remained an open question, then it can hardly be inferred that the Court approved the 34% incremental deviation described by the City.[43] Properly

42 Because *Abate* was decided before *Mahan*, in which the Court made clear that a less exacting standard of equality applies to state, as opposed to congressional, electoral districts, the reference to "slightly greater percentage deviations" in *Abate* was in contrast to the severe mathematical standard of equality affirmed in *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), and *Wells v. Rockefeller*, 394 U.S. 542 (1969). Thus, in *Mahan*, *Abate* is cited not as a case about the standards applicable to municipal government as a special category, but rather about those applicable to state government in general. 410 U.S. at 322.

43 The City reaches this figure by calculating the percentage increase in population deviation created by allowing the least populated district to have

read, *Brown* approved only *de minimis* variations in voter strength. Thus, the deviations at issue here are far beyond the limits that the Court has suggested might permissibly exist even if properly justified by legitimate state policies, and they are far beyond the standards that have been routinely followed by the lower courts.

This conclusion follows regardless of the mathematical model used to calculate the deviation from voter equality among the districts. While Appellees believe that the lower courts properly found a 132.9% deviation, other methods of calculation produce equally unacceptable results. For example, application of the voter power analysis that the New York State courts apply to county government schemes yields a 338% deviation. *See* Charo, *supra* n.7 at 790.[44] Allocating at large members to the boroughs on the basis of borough population—an allocation which the lower court properly rejected—produces a 78% deviation. *See* Stipulation on Summary Judgment, JA 47, 206; A 163. Only the City's methodology reduces the deviation to 30.8%.[45] While that number is twice the deviation ever approved by this Court, we show below that the City's methodology is wholly inappropriate and produces results completely incomparable to the calculations in the Court's prior cases.

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its own representative. City's Brief at 40. In fact, the incremental deviation approved in *Brown* was of a completely different order of magnitude: "The District Court noted . . . that the seven counties in which appellants reside will elect 28 representatives under either plan. The only difference, therefore, is whether they elect 43.75% of the legislature (28 of 64 members) or 44.44% of the legislature (28 of 63 members). The District Court aptly described this difference as '*de minimis*.' " 462 U.S. at 847 (citation and footnote omitted).

44 Charo also explores in detail the wealth of alternative mathematical models which lead to deviations measuring from 153.07% to 76.33%—all well beyond acceptable limits.

45 Appellant Ponterio uses a weighted voting methodology to conclude that there is only a 12% deviation. However, he misapplies the methodology by failing to calculate the population deviation as a percentage of "normal" voting power. Properly calculated, the deviation is 338%. *See* Charo, *supra* n.7 at 790. Notably the City's methodology yields a 49.36% deviation on budget matters where the Mayor does not vote.

B. The Abstract Mathematical Methodology Offered By The City Is Unprecedented And Unwarranted

While this Court does not normally review district court findings of fact upheld by a circuit court, the City focuses its argument on the lower courts' finding of a 132.9% population deviation among Board electoral districts. *Cf. Mahan v. Howell*, 410 U.S. at 319 n.6 ("We decline to enter this imbroglio of mathematical manipulation and confine our consideration to the figures actually found by the [lower] court and used to support its holding of unconstitutionality."). Before the District Court, the City argued that only a qualitative, and not a quantitative, analysis should be used in evaluating the Board's scheme of representation. A 139. In its brief on appeal, however, it offered a new and immensely complex methodology for measuring deviations from voter equality. Having moved from one extreme to the other, the City now pursues its effort at "mathematical metaphysics" in this Court. A 131. The City's efforts, however, continue to miss the constitutional measure of equality.

This Court has settled on a clear and simple method of quantifying citizen voting power based upon a comparison of the populations of the smallest and the largest districts—Staten Island (352,121) and Brooklyn (2,230,936)—to the "ideal" or average district (1,414,206). This comparison is captured in the lower courts' finding of a 132.9% deviation. This is a realistic expression of the fact that Brooklyn is six times larger than Staten Island, yet they have equal representation.

In its attempt to conceal the differences in district size, the City advocates an approach that combines borough representation on the Board with citywide representation and calculates voter strength on the basis of a theory already rejected by this Court as "unrealistic." This approach was properly rejected by both courts below.

1. The Seating Of At Large Board Members With The Borough Presidents Does Not Mitigate The Population Disparities Among The Districts

In its reversal of the District Court's initial holding that the one person, one vote rule does not apply to the Board, the Circuit Court remarked:

> [T]he fact that three members of the Board are elected at large from the entire city raises novel issues as to how an individual voter's opportunity to elect these members should be assessed in conjunction with his opportunity to elect his borough representative.

A 207. On further reflection, the lower courts concluded that the issues were not "novel" and that it was appropriate to exclude the at large members from the calculation of district malapportionment.[46] The common-sense strength of this position is obvious. All residents of the City are treated alike insofar as they participate in the election of the at large members. Only in the selection of their district representatives are they treated differently. The constitutional claim begins where the inequality begins. Furthermore, any attribution of a share of the at large representation to particular boroughs would be wholly arbitrary because citywide politics responds to different issues and voter coalitions than does borough politics. This commonsense view is fully supported by the law and the facts of this case.

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46 The District Court relied, in part, on extensive precedent for separately evaluating the apportionment of borough presidents. It cited *Latino Political Action Committee, Inc. v. City of Boston*, 568 F.Supp. 1012, 1015 (D.Mass. 1983) (four at large, nine district); *Cohen v. Maloney*, 410 F.Supp. 1147, 1149-50 (D.Del. 1976) (four at large, eight district); *Markoe v. Legislature of the Virgin Islands*, 592 F.2d 188, 190-91 (3d Cir. 1979) (one at large, fourteen district); *Perry v. City of Opelousas*, 515 F.2d 639, 641 (5th Cir. 1975) (one at large, five district); *Martin v. Venables*, 401 F.Supp. 611, 613 (D.Conn. 1975) (one at large, ten district); *Oliver v. Board of Education*, 306 F.Supp. 1286 (S.D.N.Y. 1969) (two at large, five district). A 137-38, 150-51. *See also Grisbaum v. McKeithen*, 336 F.Supp. 267 (E.D.La. 1971) (three at large, four district).

Both of the lower courts analyzed the functions of the district and at large Board members and both concluded that in New York City, at least, their dissimilarities overwhelm their similarities. To add them together to determine some theoretical quantum of voting power would be to add apples and oranges. This functional analysis by the lower courts was fact-sensitive and clearly correct as a matter of this Court's own approach to problems of representation.

The proposition that officials serve the constituency that participates in their election, and not some sub-set of this group, has been a mainstay of this Court's voting cases. In *Fortson v. Dorsey*, 379 U.S. 433, 438 (1965), for example, district residency requirements in an at large scheme prompted the observation that,

> since tenure depends upon the county-wide electorate, [a senator] must be vigilant to serve the interests of all people in the county and not merely those of people in his home district; thus in fact he is the county's and not merely the district's senator.

And in *Dusch v. Davis*, 387 U.S. 112, 116 (1967), a similar combination of residence requirements and citywide elections was upheld with a qualification: "If a borough's resident on the council represented in fact only the borough . . . different conclusions might follow." *Accord Dallas County v. Reese*, 421 U.S. 477, 480 (1975) ("elected officials represent all of those who elect them, and not merely those who are their neighbors").

Following this principle, the Circuit Court held that

> the Board's members primarily represent the different constituencies that elect them. The borough presidents sit on the Board of Estimate as representatives of the special concerns their constituents have *qua* residents of a particular borough. The citywide members, on the other hand, must be supposed to transcend such purely local interests, and to represent primarily the interests of their constituents *qua* residents of New York City.

A 32-33 (footnote omitted). This analysis is not anywhere disputed by the City. Indeed, this conclusion echoes the City's own submission at an earlier stage:

> It is the borough presidents, not the City-wide officials, who reflect the local interests of each borough. The interests of the City as a whole are not necessarily the sum of the separate interests of each borough.

City Appellees' Brief in the Second Circuit (Feb. 20, 1987) at 27. If citywide interests are not simply those of the sum of the parts, they most emphatically are not those of less than that sum. In short, Brooklyn's overwhelming disadvantage on the Board is not mitigated by the presence of citywide officials on the Board.[47]

The flaw in the City's argument is further evidenced by the fact that the citywide officials on the Board regularly disagree. *See supra* nn.2, 30-37. Surely, they cannot all be representing the interests of Brooklyn, or the other large boroughs, when they disagree among themselves.

When the citywide members divide publicly, or when they disagree privately, none can prevail without the support of one or more borough presidents. The borough presidents are, therefore, the focus of deals engineered by each citywide official in which citywide interests are likely to be tempered by the interests of particular borough presidents. In that horse-trading and logrolling, each borough president has an equal vote and thus equal power. Given equal votes, there is no reason to believe the larger boroughs have any advantage.

In the end, either citywide representational interests are different from or they dissolve into parochial interests of local districts. In neither case has the basic malapportionment of the City's electoral districts been mitigated.

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47 A forceful illustration of the flaw in the City's attempt to distribute at large representation to compensate for malapportioned districts is to imagine an electoral scheme in which delegates were generally elected at large, but one small group, or even an individual, was given an additional representative. This sort of arbitrary and capricious action would appear insignificant when submerged within the larger number of at large representatives. The constitutional measure must identify, not obscure, such arbitrary action.

Intuitively, it might seem that citywide officials would focus their representation on the larger boroughs and that this would have some mitigating effect on district malapportionment. The City, however, offered no such evidence. No evidence was offered because the proposition is simply wrong. Citywide elections are not won by carrying boroughs. They are won by building coalitions of people across all intracity boundaries. There is no correlation of the interests of the larger boroughs, *qua* boroughs, with the interests of these winning citywide coalitions.

No court, including this one, has ever melded at large and district representatives when considering a constitutional challenge to an apportionment scheme in a mixed electoral system. *See e.g. Avery*, 390 U.S. at 475 (four district, one at large representative). The City responds that the issue here is different because, unlike prior cases, the three at large officials control a majority of the votes on the Board. The Circuit Court was singularly unimpressed with this quantitative response to a qualitative analysis of the functions of the different kinds of board members:

> [T]here is no principled reason (nor do appellants attempt to provide one) why *different basic theories* of equal protection should apply depending on the size of the at-large membership.

A 43-45 (emphasis in original). Moreover, the City ignores the more complex voting structure of the Board. On budget issues and issues requiring supermajorities, the citywide officials do not control Board decisions. As a practical reality, the same can be said of majority votes when the rivalries among citywide members cause some of them to divide. *Supra* at 13-15.

The mixed system of at large and district representatives is quite a common form of municipal government.[48] The lower

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48 It is used, for example, in 19% of all cities and in 67% of those cities with a population exceeding 1,000,000, including Philadelphia (ten district, seven at large), Memphis (six district, seven at large), Dallas (eight district, three at large), and Washington (eight district, five at large). *See* H. Sanders, "The Government of American Cities: Continuity and Change in Struc-

court was clearly correct in holding that the same constitutional rule must apply to any such mixed system, regardless of the particular distribution of votes.[49]

2. Appellants' Calculation Of A 30.8% Deviation Among The Boroughs Is Based On A Flawed And Previously Rejected Mathematical Theory Of Voter Strength

This Court's apportionment decisions stand for the proposition that whenever a state or local government chooses to rely on single-member electoral districts, it must make a good faith effort to equalize populations within those districts. Each representative must represent an equal number of people; each voter has a right to participate equally in the selection of representatives. Instead of representation and voter participation, which are grossly unequal here, the City would have this Court focus on the voter's power to affect the outcome of a Board vote. Such a focus is unprecedented. Even accepting this focus, however, the City fails to address the reality of voter power and the Board's actual decisionmaking process, subjects of immense empirical complexity. Instead, it offers a highly controversial, abstract mathematical approach, which does not even purport to represent reality. This theory, moreover, has been previously rejected by this Court, is seriously flawed in itself, and is inconsistent with New York State's own practice of measuring voter power.[50]

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ture," *The Municipal Yearbook 1982*, Washington, D.C.: International City Management Association, 1982, Table 3/3:180; MacManus, "Mixed Electoral Systems: The Newest Reform Structure," 74 Nat'l Civic Rev. 484, 486 (1985). In no other city of which counsel is aware, however, are the districts in such a mixed system based on political subdivisions rather than population.

49 The notion that the presence of the citywide officials somehow mitigates malapportionment among the borough presidents could, by analogy, lead to rather absurd results in state apportionment cases. No one, for example, has ever suggested that malapportionment of a state house is somehow mitigated by the fact that the governor too must approve legislation and that he or she will be more responsive to the voters of the larger districts.

50 The City's theory relies entirely on the controversial mathematical work of Professor Banzhaf. *See e.g.* B. Grofman and H. Scarrow,

The City's mathematical model requires, first, a calculation of each Board member's voting strength based solely on the number of theoretical instances in which a Board member's vote can determine a Board decision—regardless of the likelihood of any of these instances actually occurring. Second, it requires a calculation of each citizen's ability to affect the outcome of the election of a representative, again defined only in terms of the theoretical ability of an individual voter to cast a deciding vote. Third, it requires aggregating each individual voter's theoretical voting power over his borough representative and citywide representatives. We have already explained why this last step is a mistake. The first two steps are no less in error.

a. The Power Of A Representative Is Not Limited To The Ability To Cast A Deciding Vote

The City's mathematical model assumes that the constitutional concept of representation is a function solely of the representative's ability to cast a deciding vote. This is determined by an abstract calculation of the possibility of casting such a vote in all of the theoretically possible combinations of representatives' votes. At no point does this theory of representation make contact with the actual reality of the Board's decisionmaking process.[51]

"Weighted Voting In New York," 6 Legis.Stud.Q. 287 (1981) (hereafter "Grofman and Scarrow: Weighted") (lodged with the Clerk's Office). The Banzhaf theory was never intended to justify malapportioned single-member districts, but rather to design weighted voting systems for districts of disparate populations. Under such a system, there is no reason not to approach substantial equality among the districts: It is just a question of adjusting weighted votes.

51 Notably, Banzhaf himself has explained:

> [M]athematical models do not purport to present a realistic picture of the actual operation of such systems "which of course would involve factors such as party politics and urban-rural interests which are not considered by these simple models."

Iannucci v. Board of Supervisors, 20 N.Y.2d at 258 (Brietel, J., dissenting, quoting Banzhaf).

This Court has never relied upon such a method of calculation.[52] Furthermore, this model is at odds with the concept of representation implicit in this Court's cases analyzing the right to vote. Those cases have focused on equal participation in the process, not on proportional control of outcomes. For example, in *Avery* the Court confronted a commissioners' court composed of four districts and one at large representative. Yet, as the Circuit Court observed,

> [The Court] did not analyze the effect on voting power of the presence of the at-large member, focusing instead entirely on the population disparity among the districts electing the other four members. A court that looks only to voters' relative power to elect representatives for single-member districts, where the scheme also includes at-large members, is obviously not thinking of equality in terms of power over the *outcome* of votes in the governing body.

A 19-20 (emphasis in original). Similarly, in upholding supermajority requirements the Court implicitly held outcome analysis irrelevant in right to vote cases. *Gordon v. Lance*, 403 U.S. 1 (1971).

The Circuit Court appropriately debunked the essential presumption of the Banzhaf scheme:

> The problem is that it gives the same weight to and assumes the same probability of occurrence for each of 552 possible voting combinations . . . . This assumption ignores . . . that deference that the Board traditionally pays the views of borough presidents on matters affecting their boroughs in particular ways.

52 In *Franklin v. Krause*, 32 N.Y.2d 234 (1973), *appeal dismissed for want of a substantial fed. ques.*, 415 U.S. 904 (1974), this Court summarily affirmed a New York State case approving use of a weighted voting scheme that similarly analyzed the representational function. There, however, the approach was used to design electoral schemes to meet *Reynolds*' requirement of population based reapportionment, not to defend an existing malapportioned scheme that was never intended to represent voters. Even the scheme in *Franklin*, however, did not use the second part of the City's methodology: application of the square-root of population size to analyze relative voting power. *See infra* at 33-36.

A 46 (citation omitted). Political realities, not disputed in this case, predetermine Board voting patterns. Furthermore, the presumption behind the City's model contradicts what is common knowledge: A representative is most effective when he is building powerful majorities, not when he is casting his rare, critical vote.

Finally, the City's analysis of representation on the Board ignores the very real and tangible differences in representation inherent in one representative for 350,000 people and one for 2,200,000. In a multi-community borough such as Brooklyn, the borough president's ability to provide constituent services pales by comparison to that of the borough president of Staten Island. *See supra* at 10-15. This role of a representative is fairly equalized by the Court's traditional arithmetic test; it is ignored in the City's model. *See WMCA v. Lomenzo*, 238 F.Supp. 916, 923-24 (S.D.N.Y. 1965).

b. The City's Calculation Of Voter Power Relies On A Theory Already Rejected By This Court As Unrealistic

Turning from representatives to voters, the City's mathematical model again ignores the reality of voter participation. It relies instead upon a quantification of an individual voter's theoretical opportunity to affect the outcome of an election. In calculating this theoretical possibility, the City adopts the controversial square-root analysis advocated by Professor Banzhaf.[53] Instead of directly comparing district populations, the City compares districts by the square-root of the population. This dramatically reduces the numerical expression of the malapportionment.[54]

This Court has once before rejected the Banzhaf theory of square-roots. In analyzing a challenge to the use of multimem-

53 B. Grofman and H. Scarrow, "The Riddle of Apportionment: Equality of What?," 70 Nat'l Civic Rev. 242, 245 (1981) (hereafter "Grofman and Scarrow: Riddle") (lodged with the Clerk's Office). Appellant Ponterio specifically disavows this aspect of the City's methodology because of its reliance on "unrealistic assumptions." Ponterio Brief at 28-29.

54 For example, if one were to accept the City's method of calculation in general but reject the use of the square-root, the malapportionment of the Board would jump immediately from 30.8% to 149%.

ber districts in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), the Court described this same approach as "theoretical," and not " 'tak[ing] into account any political or other factors which might affect the actual voting power.' " 403 U.S. at 145-46 (citation omitted). The Court very clearly stated what a party would have to do before a court could accept this theory in place of the traditional judicial approach to malapportionment issues: A showing, on the record, would have to be made demonstrating a relationship between the Banzhaf methodology and "the real-life impact" of the electoral scheme. *Id.* at 146. The City has never offered to make such a showing. Instead, it offers the same theory rejected precisely because it was only a theory in *Whitcomb*. As the Circuit Court pointed out:

> [A] core claim of the Banzhaf analysis, that the ability of a voter to cast a decisive vote in an election is the proper test of voting power, is unrealistic . . . . It is unrealistic in a general sense involving voter motivation; and it is unrealistic in a particular sense as it applies to citizen voting power through the Board of Estimate.[55]

A 24.

Not only is the square-root theory inconsistent with the Court's traditional view of equal participation in the electoral process, but it creates additional difficulties. Because the square-root approach would assign fewer representatives to multimember districts than would the traditional approach, residents of such districts would not receive the same quality of constituent services as residents of single-member districts. In addition, the key principle that a majority of the population should control a majority of representatives could be undermined: When multimember districts are used in combination with single-member districts, representatives of a minority of

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55 The Circuit Court quotes numerous political scientists who conclude that voting has little to do with outcome and much more to do with civic pride, partisanship, race and other group characteristics. Few, if any, voters vote because they think their vote will *win* an election. A 24-25. Perhaps a good analogy is yelling at a football game. It is unlikely the quarterback will hear a particular shout of support and, elated, throw the winning touchdown. But the home crowd roar is always worth several points for the betting spread.

the population could control a majority of the vote on a governing unit.[56] Both of these points are critical to a full understanding of the function and meaning of democratic representation. The City discards both without a word of explanation.

Even under the methodology accepted by the New York courts for evaluating county government voting schemes, the City's argument can find no support. While New York State counties do rely on a "voting power" index for adjusting the weighted vote of town representatives within county government, they have not embraced Banzhaf's square-root principle. *See League of Women Voters v. Nassau County Bd. of Supervisors*, 737 F.2d 155 (2d Cir. 1984), *cert. denied*, 469 U.S. 1108 (1985); *Iannucci v. Bd. of Supervisors*, 20 N.Y.2d 244 (1967); Grofman and Scarrow: Riddle at 244-54. Rather, the State courts require counties to weight votes on the basis of actual population. Adopting the well-established New York method of calculating voting power yields a deviation within the Board's electoral scheme of 338.22%. *See* Charo, *supra* n.7 at 790. This is a figure not even the City would defend.

The combined effects of the City's various theoretical innovations can lead to rather absurd results. For example, were Staten Island *entirely* denied a representative on the Board, the total deviation among districts would improve.[57] By contrast, eliminating Staten Island's representation would, under the Court's traditional methodology, produce an incalculable deviation.

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56 *See* Grofman and Scarrow: Riddle, at 252-253.

57 Using the City's methodology, *see* City's Brief at 35-37, each borough president for the boroughs other than Staten Island would have 9.52% of the critical votes, and each citywide official, 20.63%. Deviations would be calculated as follows:

	Citywide Voting Power	*Borough Voting Power*	*Total Voting Power*	*Deviation*
Brooklyn	.02328	.00637	.02965	-5.24%
Queens	.02328	.00692	.03060	-2.20%
Manhattan	.02328	.00797	.03125	-.13%
"Ideal"	.02328	.00801	.03129	0.00%
Bronx	.02328	.00881	.03209	+2.56%
Staten Island	.02328	.00000	.02328	-25.59%

Total Deviation 28.15%

This example is meant only to illustrate a basic point: The City's complete reliance on a controversial, abstract theory invites the Court to enter into precisely the kind of "imbroglio of mathematical manipulation," *Mahan*, 410 U.S. at 319 n.6, that this Court has avoided for twenty-five years. The mathematical manipulation of the data in this case has been of immense complexity. Calculations of the quantitative deviations of voter strength within the boroughs have varied from 338% to 30.8%. In the end, all of the competing models "are just a shorthand for expressing population differences," Charo at 793. The real concern must focus, not on the various competing theories, but on the underlying gross population differences among the boroughs. Theory cannot hide the fact that Brooklyn has six times the population of Staten Island, yet each has equal representation on the Board.[58]

Finally, the City's mathematical methodology assumes that a court can compare percentages of deviation of voting power, arrived at under this *sui generis* method, with deviations fixed by the Court's traditional method. Assuming that the City's mathematical methodology measures something, the 30.8% deviation measures some idiosyncratic, hybrid amount of voting power deviation. This number simply cannot be compared to results obtained under the standard measure which compares varying populations per district. Some translation of the figures into a common language is required.[59]

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58 The difference in treatment of Brooklyn and Staten Island is clear to every voter. Only a theoretician with a sophisticated computer program could begin to believe that that difference is not what it seems. At that point of complexity, however, theory becomes too complex even for the lawyers and the courts. *See e.g.* Ponterio's calculation of a 12% deviation, *supra* n.45. Such problems would be endemic to a reliance on complex mathematical theories. Thus, it is not coincidental that the same mistake that Ponterio makes appears in the papers upon which the Court relied in its summary affirmance in *Franklin v. Krause*. For a detailed explanation, *see* Grofman and Scarrow: Weighted at 297-299.

59 For example, in *Cohen v. Maloney*, 410 F.Supp. 1147 (D.Del. 1976), the district court found 18.4% deviation as a basis for invalidating a mixed district and at large system. *See supra* n.46. Under the City's methodology, that invalidated deviation is only 3.8%.

II.

The City's Proffered Justifications Fail To Correspond To The Facts In New York City Or To The Interests Previously Recognized As Legitimate By This Court

Apart from gerryrigging the numbers, the City offers two arguments to justify the substantial deviations from equality at issue here. First, it argues that substantially increased "flexibility" is required in the evaluation of innovative municipal designs. Second, it argues that a range of special Board functions justify its structure, despite the substantial deviations from equality. In fact, New York City does not exhibit the characteristics that have generally led this Court to speak of a need for flexibility in the evaluation of municipal institutions and the special functions identified either are not served by the Board scheme or are based on misreadings of this Court's prior cases.

A. New York City Does Not Exhibit Those Characteristics That Could Justify Increased Flexibility

The City substantially misunderstands what this Court has meant by "flexibility" with respect to the constitutionality of municipal governmental institutions. While the Court has indicated that some "slight" increase of deviations from voter equality might be permissible in the municipal context, it has usually had quite a different idea in mind when it has spoken of flexibility. It has meant flexibility *within the rule of one person, one vote*. This point was made in *Avery*, in which the Court emphasized that it was not erecting "roadblocks in the path of innovation, experiment, and development among units of local government." 390 U.S. at 485, *citing Sailors v. Bd. of Education*, 387 U.S. 105 (1967), and *Dusch v. Davis*, 387 U.S. 112 (1967). The citations to *Sailors* and *Dusch*—the very cases upon which the City relies—make this entirely clear. Both involved innovative local government designs that did not offend the principle of *Reynolds*: not because greater quantitative deviations were permitted, but because the rule was either not applicable at all or was wholly satisfied. *Sailors* involved the use of appointed office to which *Reynolds* does not apply. *Dusch*

involved the use of at large elections combined with district residence requirements; the at large quality immediately satisfied the rule of one person, one vote. These were intended as examples of the ample room for flexibility that remains under the constitutional rule of voter equality.[60]

Thus, there was no contradiction in *Avery* between the Court's affirmation of municipal innovation and its imposition of

> one ground rule for the development of local . . . government: a requirement that units with general governmental powers over an entire geographic area not be apportioned among single-member districts of substantially unequal population.

390 U.S. at 485-86. This remains true in New York City. As the lower courts found, there are a variety of alternative structures available to the City that will meet its interests as well as the constitutional requirement of equality. *See infra* at III.

Flexibility need not, accordingly, mean inequality. If flexibility is interpreted to mean slightly relaxed standards of equality in comparing municipal electoral districts, *supra* at 22-24, then an examination of the reasons for that kind of flexibility demonstrates their inapplicability in the circumstances of this case.

The less severe standard of equality for state, as opposed to congressional, apportionment schemes has been based on three factors: first, congressional districts are "enormous" compared to typical state legislative districts, *White v. Weiser*, 412 U.S. 783, 793 (1973); second, there are normally "a significantly larger number of seats in state legislative bodies . . . than congressional seats [within a state]," *Mahan*, 410 U.S. at 321; third, state legislative districts are normally "intertwined and freighted with strictly local interests." *White*, 412 U.S. at 783; *see also Karcher v. Daggett*, 462 U.S. 725, 781 (1983) (White J., dissenting). The rationale for a slightly weaker standard of

60 Special governmental units with a limited franchise represent yet another kind of local government innovation that does not conflict with the rule of *Reynolds*. *See Sayler Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973); *Ball v. James*, 451 U.S. 355 (1981).

equality in the case of municipal governments has been explained by citing parallel considerations:

> (1) [L]ocal legislative bodies frequently have fewer representatives than do their state and national counterparts. *Abate*, 403 U.S. at 185.
>
> (2) [L]ocal legislative districts may have a much smaller population than do congressional and state legislative districts. *Id.*
>
> (3) [T]he need for intergovernmental coordination is often greatest at the local level. *Id.* at 186.

This list, however, was tempered with a reminder: "Of course, this Court has never suggested that certain geographic areas or political interests are entitled to disproportionate representation." *Id.* at 185.

Both lists focus on a functional account of the reasons for, and the effects of, loosening the standard of equality.[61] The functional reasons emphasize a sensitivity to efficient operation of governmental services within a situation in which representation of "local interests" is critical if government is to respond to "changing societal needs." *Abate*, 403 U.S. at 185. The expected effect of slightly greater deviations at the local level is less significant because the districts are generally small. None of this is true in New York City: Neither the functions nor the effects that the Court has focused on in its discussion of local government is present in this City of more than 7,000,000 people.

First, the enormous size of the Board electoral districts means that even slight deviations will deny an equal vote to tens of thousands of people. Four of the five districts are larger than congressional districts. Brooklyn and Queens subsume 9 congressional districts, 13 (and parts of two more) state senatorial

61 These lists are in some tension. The larger number of state legislators, as compared to congressional members within a state, is listed as a reason for loosening the standard for evaluating state legislative schemes. By contrast, the smaller number of municipal representatives, as compared to state legislators, is listed as a reason for loosening the standard of equality in evaluating municipal legislative schemes.

districts and 35 state assembly districts. Brooklyn is by far the most populous substate representational district in the nation, and Queens is second. Thus, the effects of population deviations here are not comparable to those in a typical municipal government and are clearly not what the Court had in mind in its discussion of local electoral schemes.

Second, the functions of Board representation fail to correspond to the concerns expressed in *Abate*. The Board structure is surely not an attempt to "meet changing societal needs."[62] Nor do Board districts correspond in any meaningful way—outside of Staten Island—to "local interests." Brooklyn, which in itself is larger than 17 states, is hardly an example of the "localism" the Court was seeking to protect. At issue in this lawsuit is precisely the failure of the Board structure to give expression to the diverse local interests and local communities within the larger boroughs.

Finally, granting the Board equal votes for large and small boroughs alike, incorporates the kind of "built-in-bias" warned against in *Abate*, 403 U.S. at 185-186 ("[A] built in bias . . . which necessarily will tend to favor . . . less populous districts over their more highly populated neighbors") and held unconstitutional in *Hadley v. Junior College District*, 397 U.S. 50, 56-58 (1970) (allocation of school board seats inevitably favored small districts).

This Court has frequently warned that apportionment challenges require a case-by-case approach that looks to the unique facts of each electoral scheme. *Reynolds*, 377 U.S. at 578; *Mahan*, 410 U.S. at 328-329; *Swann v. Adams*, 385 U.S. 440, 445 (1967). On the facts of this case, application of a flexible standard of equality is unjustified.

62 To the extent that there have been any changes at all in Board structure, they have increased, rather than decreased, the malapportionment. Up until 1958, there was at least some crude recognition given to population differences among the boroughs: The two largest boroughs had votes weighted at twice that of the other three boroughs. If that system were still in use, the deviations would be 76%.

B. The City's Justifications Fail

1. The Board Is Not A Regional Government

The City's primary justification rests on what it perceives to be a "regional government" exception to the ordinary rule of one person, one vote.[63] While this Court has never explicitly defined or articulated a "regional government" doctrine under *Reynolds*, it has been sensitive to a cluster of concerns that can be characterized as "regional." The City, however, misconstrues both the nature of these concerns and the nature of New York City government.

The Court has recognized that certain forms of governmental entities do not generally operate directly on their constituent populations. Rather, some significant portion of their work is directed at constituent governmental entities. In effect, they operate through and with constituent governmental entities, which, in turn, maintain a direct relationship with the people. *See Lockport*, 430 U.S. at 268-272. In these situations, the "regional government" has responsibilities for coordinating the actions of the local governmental entities and acting in cooperation with these subordinate units of government.

This was just the sort of governmental structure that the Court examined in *Abate*: a "local structure in which overlapping public services are provided by the towns and their county working in close cooperation." 403 U.S. at 183. Examples of this cooperation included budget and tax matters—"the towns adopt their own budgets and submit them to the county which levies taxes . . . based on real property assessments established by the towns but equalized by the county board," *id.*—and "cooperative efforts" in the provision of public services. *Id.* These parallel efforts justified the use of an apportionment plan that, while based substantially and primarily on population equality, also sought to preserve "an exact correspondence

63 The City's justifications are for the most part a rehash of justifications offered and rejected by this Court in its summary affirmance of the unconstitutionality of the New York City Council's allocation of two at large seats to each borough. *Andrews v. Koch*, 528 F.Supp. 246 (E.D.N.Y. 1981), *summ. aff'd*, 688 F.2d 815 (2d Cir. 1982), *aff'd sub nom., Giacobbe v. Andrews*, 459 U.S. 801 (1982).

between each town and one of the county legislative districts." *Id.* at 187.

Other cases discussing regional interests are marked by similar functional interactions between active and effective local government, on the one hand, and the regional entity, on the other. In *Brown*, for example, the Court's sensitivity to county representation within the State House was founded on the fact that "counties are the primary administrative agencies of the [Wyoming] State government." 462 U.S. at 841 n.5. And in *Mahan*, the Court relied heavily on the government (regional) to government (local) operations of the state legislature. 410 U.S. at 323.

The doctrine, then, has little to do with some sort of "regional level" of government. Rather, it has to do with certain structural features of some institutions of state government, regardless of whether they appear at the state, county or municipal level.[64] In this case, those structural features are not present. The boroughs have atrophied to the point where they do not deliver services, collect taxes, or regulate the affairs of borough residents. There simply is no local government upon which a "regional government" could operate in New York City.

Notwithstanding the City's lengthy compilations of borough references in the City Charter and State statutes, City's Brief at 6-7, the absence of borough authority to pass ordinances, set tax rates or abatements, fix a budget, determine land use, execute contracts, administer agencies, issue debt or perform any other typical governmental function disqualifies these particular political subdivisions from any fair characterization as active governmental units. *See supra* at 8-10. It is beyond dispute that a borough's only elected official—the borough

64 Interestingly, in each of the cases in which the Court has suggested approval of this doctrine, the State had recently undergone a reapportionment in order to bring the existing apparatus of State government into line with the requirements of the constitutional rule of one person, one vote. In each case, the state had relied on this doctrine in order to make some minor modifications in that reapportionment plan. In the context of an on-going, good-faith effort to meet the requirements of *Reynolds*, the Court recognized this competing end.

president—has virtually no authority independent of his or her role as a Board member. Thus, while the Court has shown a sensitivity to regional concerns, "regionalism" is hardly a label that can be applied to a municipality that comprises no other governments within its jurisdiction. New York City government is no more regional in the relevant sense than is any other centralized government that bases membership on elections within geographically defined districts.

2. The Board Structure Does Not Serve Local Community Interests

Regionalism is also confused by the City with the separate justification of "localism." The Board, the City argues, makes decisions about land use and the provision of services that have a particularly local impact. Therefore, unlike a state legislature,

> the use of pre-existing boundaries is not simply a matter of convenience; a direct relationship exists between the Board's powers and operation and the historic, geographic and political boundaries of the borough.

City's Brief at 29. Again, the City has confused two distinct ideas, only one of which is valid.

Appellees do not contest the fact that the Board exercises the critical powers of centralized government in the City and that many of the Board's decisions have a particularly local impact. Such decisions may indeed be best made by an institution of government that includes, either wholly or partially, representatives of local districts. This is a central reason for the widespread preference for the use of small geographical districts. Appellees have never suggested that the Board must be, or even should be, replaced by a new institution of centralized government consisting wholly of at large members.

Localism in this functional sense, however, is not furthered, but rather undermined, by the structure of the Board. This is vividly demonstrated in the City's own brief when it describes the reason that the borough president of Staten Island sits on the Board:

> [N]ot because it seemed a nice way to form a district [but rather because] the use of land in Staten Island is controlled by a central authority whose decisions about the land peculiarly affect the people there.

City's Brief at 43. What is true of land use in Staten Island, however, is true of every local community throughout the City. What is also true, however, is that the people of the other neighborhoods are not as well represented on the Board as the people of Staten Island. Staten Island is hardly unique in its concern with the Board decisions that affect it. Yet it is unique in the power it has to participate in those decisions. *See supra* at 10-15, 28-30.

3. History And Efficiency Alone Cannot Justify The Board Structure

Finally, the City offers a mix of historical and efficiency arguments to justify the gross inequalities in the treatment of voters in the various boroughs. In themselves, of course, neither history nor efficiency have ever been recognized as grounds for the denial of an equal right to vote.

History has not been a virtue, but a tremendous burden, in reorganizing state and local government to meet the constitutional principle of one person, one vote. The state legislature of Alabama at issue in *Reynolds*, for example, had not been reapportioned since 1901. This sixty-three year history hardly counted in favor of the plan. As the Court recognized, "[r]epresentation schemes once fair and equitable become archaic and outdated." 377 U.S. at 567. If the scheme of the Board of Estimate was ever "fair," it has long since become "outdated."

Moreover, the City does not have its history right. Representation of borough presidents on the Board *was not* a condition of unification of the various local governments brought together to form the City of New York in 1898. City's Brief at 3, 8-9. The State *did not* conclude "that providing an equal vote to borough presidents was essential to obtain a consensus on the transfer of local power to a central authority." *Amicus* Brief of Beame and Sutton at 6. First, no such consensus was ever sought or obtained. Second, boroughs were not even represented on the Board at the time of, or as a result of, consolidation. *See supra* at 3-5. Even if the City had its history right, however, it cannot be the case that a deal cut in the past can hang over the constitutional rights of the present voters of New York City. The constitution does not authorize the State to bargain away the constitutional rights of New York City's residents, even if the deal was made 100 years ago.

Closely connected to these "historical" arguments is the claim that the small size of the Board and its equal treatment of district representatives make it "efficient." But the right to an equal vote is of constitutional stature, *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."); *Kramer v. Union School District*, 395 U.S. 621, 626 (1969); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972), and as such it cannot be denied for the sake of efficiency alone. *Reed v. Reed*, 404 U.S. 71, 76 (1971); *Stanley v. Illinois*, 405 U.S. 645, 656 (1972); *Trimble v. Gordon*, 430 U.S. 762, 770-72 (1977). The issue is not whether New York City is being run well—an issue on which opinions will vary across the political spectrum—but whether the citizens of New York are being denied a constitutional right to equal participation in the electoral process by which they are governed.

III.

The Lower Courts Appropriately Looked To Evidence Of Alternatives, Not To Frame Possible Remedies, But To Measure The Strength Of The City's Interests In The Board Electoral Scheme

The City does not appropriately characterize the lower courts' action in considering alternatives, when it describes those courts as applying a "least restrictive alternative" analysis. City's Brief at 44. The lower courts, rather, adopted a wholly commonsense approach to measuring the strength of the City's proffered interests in this particular Board structure by looking to reasonably available alternatives that could meet

those interests equally well, without intruding so massively on constitutional rights.

This approach has frequently been approved by this Court. The consideration of reasonable alternatives was critical in the Court's reversal of a lower court's judgment sustaining the constitutionality of a 1965 reapportionment plan for the Texas State House. *Kilgarlin v. Hill*, 386 U.S. 120 (1967). The district court in *Kilgarlin* was reversed for failing to do exactly what the lower courts did in this case:

> [T]he District Court [did not] articulate any satisfactory grounds for rejecting at least two other plans presented to the court, which respected county lines but which produced substantially smaller deviations from the principles of *Reynolds v. Sims*.

Id. at 124.

Conversely, in approving a 1971 Virginia plan for the reapportionment of the House of Delegates, this Court specifically relied on the fact that

> [t]here was uncontradicted evidence offered in the District Court to the effect that the legislature's plan . . . "produces the minimum deviation above and below the norm, keeping intact political boundaries."

Mahan, 410 U.S. at 326 (citations omitted). Obviously, if the Court is going to rely on "uncontradicted evidence," it is inviting the parties, and instructing the lower courts, to consider contrary evidence that alternative plans may produce a lower deviation while "keeping intact" state ends. *See also Swann v. Adams*, 385 U.S. 440, 445-46 (1967).

Consideration of possible alternatives is not only common in the case law, it is necessary to a coherent doctrine. The City's position would require upholding deviations from voter equality whenever those deviations might, under some hypothesized set of facts, further some legitimate state interest. Without some examination of the means the state has chosen to meet even an admittedly legitimate end, the right to vote cannot be protected as an important, let alone a fundamental, right. Those means cannot be examined in the absence of a careful

consideration of alternative ways of meeting the state's interests.[65]

The consideration of alternatives is particularly appropriate in a complex fact situation like that in New York. For example, while this Court would not normally—indeed has never—suggested that among the alternative apportionment schemes that a lower court should consider are systems of weighted voting, New York State courts have accepted just such a scheme for county government. Not only is weighted voting an option, but historically it has been a feature of the Board structure: Citywide members exercise a weighted vote today and until 1958 the votes of the borough presidents were themselves crudely weighted to reflect population differences among the boroughs.

This factual texture is precisely what this Court had in mind when it warned that "[w]hat is marginally permissible in one State may be unsatisfactory in another, depending upon the particular circumstances." *Reynolds*, 377 U.S. at 578; *Swann*, 385 U.S. at 445; *accord Mahan*, 410 U.S. at 328. Only a district court, thoroughly familiar with the structure of local government and the reality of local political life, can engage in the kind of sensitive consideration of realistic alternatives that is required to measure the dimensions of the threat to the right to vote contained in state and local apportionment plans that deviate substantially from population equality. This is precisely what the District Court did in this case when it concluded that "defendants have failed to carry their requisite justification burden." A 110.

The District Court demonstrated its clear understanding of the role that consideration of alternatives has in an apportionment case when it went on to state that

> [c]onsistent with its circumscribed role, the court underscores that, while the preceding justification discussion noted the availability of possible alternatives, by no means are they recommended for implementation.

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65 For example plaintiffs presented an alternative weighted voting scheme that satisfies the City's legitimate interests with only a 7.8% deviation from voter equality. JA 565-69.

Id. at 111. Restructuring the Board to meet the rule of one person, one vote, remains a "legislative task." A 110.

CONCLUSION

Accordingly, the judgment of the Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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